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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 312.

JEWEL RAMSEY CROUCH, ADMINISTRATRIX OF THE ESTATE OF MALCOLM LEE CROUCH, DECEASED,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Jewel Ramsey Crouch, Administratrix of the Estate of Malcolm Lee Crouch, deceased, will be referred to as the petitioner; The Chesapeake and Ohio Railway Company as respondent; or these parties may sometimes be referred to as plaintiff and defendant, respectively, the position occupied by them in the trial of the case in the Circuit Court of Amherst County. The Supreme Court of Appeals of Virginia will sometimes be referred to as the Appellate Court,

the Circuit Court of Amherst County as the Trial Court, and the Supreme Court of the United States as the Supreme Court.

The respondent prays that the Petition for Certiorari be denied.

I.

OBJECTIONS TO THE JURISDICTION

Petitioner agrees that the jurisdiction of this Court is controlled by 28 U. S. C. 1257(3), the text of which appears, *infra*, at page 4.

Respondent does not contend that the fact that petitioner first sought to raise a federal question in this proceeding at the time of filing her Petition for Rehearing in the Appellate Court would defeat this Court's jurisdiction. Respondent does contend that no federal question has ever existed in the case and that the action of the Appellate Court in declaring as a matter of law that petitioner's decedent had assumed the risk of the hazard that resulted in his fatal injury did not raise a federal question.

The petitioner does not question the validity or constitutionality of any of the state statutes involved, nor has petitioner shown the existence of "any title, right, privilege or immunity . . . set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."[1]

In order for this Court to exercise its power of review over a decision of the highest court of the state, there

[1] 28 U. S. C. 1257(3).

must be a federal question involved in the decision of the state court. See *Durley* v. *Mayo*, 351 U. S. 277, 281, 76 S. Ct. 806 (1956).

The essence of petitioner's contention is that the decision of the Appellate Court was "at odds with the law of other jurisdictions which have examined the specific question involving 'volunteer' firemen" (Petition p. 10). That contention does not create a federal question. See *Fairport Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826 (1934).

Petitioner cites *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451 (1930), as authority for the proposition that the constitutional issue would have been timely raised in her Petition for Rehearing if there had been such an issue. With that we agree, but *Brinkerhoff* does not support the contention that a federal question actually exists in the present litigation. In *Brinkerhoff*, the highest court of the State of Missouri denied relief because the petitioner had failed to avail itself of an administrative procedure which the state court had previously ruled to be unavailable. This Court properly declared that the action of the Missouri court resulted in a denial of procedural due process. In fact, *Brinkerhoff* supports a determination that this Court lacks jurisdiction in this case:

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous deci-

sions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court." (*Brinkerhoff-Faris Co.* v. *Hill, supra,* at p. 680)

See also *United States* v. *Burnison,* 339 U. S. 87, 70 S. Ct. 503 (1950), and *Sage Stores Co.* v. *Kansas,* 323 U. S. 32, 65 S. Ct. 9 (1944).

II

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the state statutes and federal constitutional provision set forth in the Petition for Writ of Certiorari under this heading, the following statutes are involved:

1. 28 U. S. C. 1257 (3):

"§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) * * *

(2) * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution,

treaties or statutes of, or commission held or authority exercised under, the United States."

2. Code of Virginia, 1950, Section 10-57, which provides as follows:

"**§ 10-57. Duty in case of fires and payment of costs of suppression.**—When any forest warden sees or there is reported to him a forest fire, he shall repair immediately to the scene of the fire and employ such persons and means as in his judgment are expedient and necessary to extinguish the fire, within the limits of the expense he has been authorized to incur in his instructions from the State Forester. He shall keep an itemized account of all expenses thus incurred and immediately send the account verified by affidavit to the State Forester for examination.

"Upon approval by the State Forester the account shall be paid from the fund provided for protection of forests in the several counties or cities, as appropriated for such purpose. Any person having a claim for compensation hereunder may avail himself of the ordinary process of law in a proceeding in the county or city in which the services were rendered against the Commonwealth, in which the Director shall be made a party.

"No such payment shall be made to any person who has maliciously started the fire or to any person whose negligence caused or contributed to the setting of the fire."

3. Code of Virginia, 1950, Section 56-426, which reads as follows:

> "§ 56-426. **Manner in which right of way shall be kept.**—Every railroad company shall keep its right of way clear and free from weeds, grass, and decayed timber, which from their nature and condition are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property."

4. Code of Virginia, 1950, Section 56-428, which reads as follows:

> "§ 56-428. **Railroads liable for damage from fires set out by their engines or trains.**—Whenever any persons shall sustain damage from fire occasioned by sparks or coals dropped or thrown from the engine or train of any railroad company, such company shall be liable for the damage so sustained, whether such fire shall have originated on the company's right of way or not, and whether or not such engine is equipped with proper spark-arresting appliances, and regardless of the condition in which such appliances may be."

5. Virginia Acts of Assembly, 1966, Chapter 524, the text of which is set forth as Appendix A, *infra*.

III

QUESTION PRESENTED FOR REVIEW

The question here presented for review is nothing more than—does a state court deny a claimant due process and equal protection of the laws when it decides as a matter of law, solely on issues and principles of state law, as applied to the evidence in this case, that the status of the decedent was that of a paid fireman who assumed the risk of the

hazard that resulted in his death? In essence, petitioner is requesting this Court to substitute its judgment for that of the state Appellate Court as to the sufficiency of evidence in a wrongful death action governed solely by issues and principles of state law, in which no valid contention could be made that procedural due process was denied.

IV

STATEMENT OF THE CASE

The factual posture of this case is distorted at the outset by petitioner's inaccurate statement that her decedent was burned to death while fighting a fire "to which he had been summoned under the threat of criminal sanctions for failing to respond" (Petition p. 3). The evidence does not support that contention and the Appellate Court so found (Petitioner's Appendix A, p. 12). Petitioner's reference to R. 78 (Petition, footnote 5, p. 6) merely indicates that the forest warden in charge of the fire fighting in question had the statutory authority to summon fire fighters, an authority clearly recognized by the Appellate Court (Petition p. 15). The mere existence of such authority does not establish that it was utilized in obtaining the services of petitioner's decedent. On the contrary, the evidence establishes conclusively that the decedent was a paid volunteer fireman employed by the forest warden pursuant to the provisions of Virginia Code Section 10-57 (*supra*, p. 5). The Appellate Court so found as a matter of law.

Petitioner relies on Virginia Code Section 56-428 (*supra*, p. 6), contending that the jury finding that the fatal fire was started by the respondent makes respondent liable to petitioner as a matter of law (Petition p. 7, foot-

note 6, and p. 10). This theory was advanced to the Trial Court in the form of plaintiff's instruction No. 2 and was rejected by the Trial Court without exception (R. p. 126).

Respondent did concede in the Appellate Court that the jury verdict precluded it from contending that it was not guilty of negligence in failing to keep its right of way clear of combustible material as required by Virginia Code Section 56-426 (supra, p. 6). Neither the jury's finding of fact relating thereto, nor respondent's concession of its inability to deny negligence after verdict, nor respondent's failure to admit negligence in the Trial Court raises a federal question.

The Court should be advised of the following specific facts, to which petitioner makes no reference. The petitioner received workmen's compensation benefits in addition to Social Security benefits as a result of the decedent's death. The Virginia Legislature made a $20,000 special appropriation for the benefit of the decedent's widow and her three infant children. *Virginia Acts of Assembly*, 1966, Chapter 524 (Appendix A herewith, p. 1a). These facts conclusively establish that petitioner's decedent was employed as a paid volunteer and that he was not summoned under the threat of criminal sanctions for failing to respond.

V

ARGUMENT

Petitioner claims that the decision below precluded her and her children from obtaining workmen's compensation benefits and that she received none (Petition p. 9). That

is contrary to fact. Chapter 524, *Virginia Acts of Assembly*, 1966 (*infra*, Appendix A), recites the fact that such benefits were paid—a recitation not contradicted anywhere in the record.

Petitioner contends that the "rescue doctrine" would have sustained her jury verdict had her decedent not been treated as a professional fireman (Petition p. 9). Application of the "rescue doctrine" as a refutation of a showing of contributory negligence is a matter of state law—varying greatly in its application in the various jurisdictions. The record, page 127 (plaintiff's instruction No. 8), shows that the petitioner took no exception to the Trial Court's refusal to give an instruction offered by the petitioner which would have submitted to the jury the issue of "rescue," nor does petitioner explain how the application of that doctrine could have saved her verdict when it was totally irrelevant to the decision of the Appellate Court. That decision was that there was no jury question because there was no conflict in the evidence—a decision which raises no federal question.

The petitioner also assigns as a reason for granting the writ that:

> "The opinion below has so far departed from the accepted and usual course of judicial proceedings, that this court ought to exercise supervision. * * *"
>
> (Petition p. 9)

That language apparently was taken from Rule 19 (b), 28 U. S. C., Revised Rules of the Supreme Court, and pertains only to appeals from United States Courts of Appeals and is inapplicable in this case.

Petitioner complains that assumption of risk in this case should be left to jury determination, implying that the evidence was in conflict. The Appellate Court found as a matter of law that the petitioner's decedent was a paid volunteer fireman and, therefore, assumed the risk of the hazard that resulted in his death. That decision raises no federal question.

Petitioner argues also (Petition p. 10) that under the laws of some other jurisdictions, her decedent would be treated as an invitee. The Appellate Court decided otherwise and found that under Virginia law, fully supported by the law of other jurisdictions (Petition pp. 18-19), as applied to the controlling facts of this case, petitioner's decedent was a paid volunteer fireman and not an invitee. That decision raises no federal question. *Fairport Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826 (1934), Supra.

Petitioner demonstrates the fallacy of her contentions by final reliance on *Levy* v. *Louisiana*, 20 L. Ed. 2d 436, 36 U. S. Law Week 4458 (No. 508, October term 1967, decided May 20, 1968). The question presented in *Levy* was whether a state statute was constitutional when interpreted to allow wrongful death benefits only to legitimate children. That case merely decided that there was no rational basis for interpreting Louisiana's survival statute so as to exclude illegitimate children as a class, whose loss is no less because of being bastards and whose legal status is unrelated to the nature of the wrong inflicted on their parent. The case at bar involves no such federal question. Petitioner's decedent is declared to be a paid volunteer fireman subject to the assumption of risk doctrine like any other paid volunteer because the uncontradicted evidence supports no other conclusion.

VI

CONCLUSION

Respondent respectfully submits that the writ should be denied because there is no federal question to be decided by this Court.

Respectfully submitted,

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